STATE OF MICHIGAN

COURT OF APPEALS

DR. JOSEPH RONNY POSLUNS and SHARON POSLUNS,

Plaintiffs-Appellants,

v

GRIFFIN PEST CONTROL, INC., d/b/a GRIFFIN ENVIRONMENTAL SERVICES, LINDEN GRIFFIN, STEVE HEERES, JOHN BOROUGHF, DAVE STEERS, JANICE BOWEN, ZENECA, INC., and WHITMIRE MICROGEN RESEARCH LABORATORIES, INC.,

Defendants-Appellees.

UNPUBLISHED
June 27, 2000

No. 215709
Kalamazoo Circuit Court
LC No. 97-003241-NO

Before: Saad, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order of dismissal because of plaintiffs' violations of several of its discovery orders. We affirm.

This case arises out of alleged pesticide poisoning suffered by plaintiffs after their home was sprayed on August 1, 1997, and September 8, 1997. Plaintiffs rented a duplex from defendant Janice Bowen in 1997. Apparently, there was a problem with black vine beetles in the home and on August 1, 1997, following an inspection by defendant Dave Steers, an employee of Griffin Pest Control (doing business as Griffin Environmental Services), the home was sprayed with pesticides by defendant Steve Heeres, also an employee of Griffin Environmental Services. Plaintiffs' complaint alleges that the pesticides applied were Demand CS, manufactured and sold by defendant Zeneca, Inc., and 3-6-10 Aero-Cide, manufactured and sold by defendant Whitmire Microgen Research Laboratories, Inc. Plaintiffs claimed that they suffered adverse medical reactions after the first pesticide application. On September 8, 1997, defendant John Burroughf, an employee of Griffin Environmental Services, went to plaintiffs' home for a second pesticide application. Although Dr. Posluns complained to Burroughf about the first application, Burroughf assured Dr. Posluns that the pesticide application would be safe

with respect to plaintiffs' health and he did a second application. Plaintiffs allege that despite their continuous pleas, defendant have refused to acknowledge the contamination and clean the home.

Plaintiffs filed a nineteen-count complaint on December 1, 1997. The case proceeded to discovery and Dr. Posluns' deposition was taken on April 2, 1998, May 12, 1998, May 13, 1998, May 14, 1998, May 15, 1998, and July 28, 1998. During the deposition held on April 2, 1998, Dr. Posluns stated that he was born in Canada in 1942, that he moved to the United States in 1969, but that he has never been an American citizen. When asked whether he had a social security number, Dr. Posluns replied that he did, but that he would not state it, claiming that it was "under tight security" and that "[s]hort of a court order, I will not provide it."[1] As explained in defendants' briefs, the request for Dr. Posluns social security number was based on the allegations in plaintiffs' complaint regarding damages. Plaintiffs are claiming well in excess of $20,000,000 in damages, contending that they lost profits of several of their home business that would have been started but for the pesticide poisoning. Plaintiffs also claim various medical problems as a result of the pesticide poisoning and defendants wished to have access to their medical records.

Dr. Posluns' deposition continued on May 12, 13, 14, 15, 1998. On June 23, 1998, defendant Whitmire moved to compel Dr. Posluns to produce his social security number. The hearing was held on July 20, 1998. The trial court granted defendant's motion to compel and stated that Dr. Posluns was to "turn over the social security number, and [it was] not to be broadcast or misused." The trial court's signed order, dated July 28, 1998, compels Dr. Posluns to produce his social security number, but that defendants could not broadcast the number for reasons not related to discovery and could not be used in a manner that would violate the applicable provision of the Michigan Rules of Professional Conduct. Therefore, to the extent that plaintiffs claim that Dr. Posluns did not want his social security number to be broadcast to the public and that Dr. Posluns was not given an opportunity to provide his social security number in a way that would keep it from being broadcast, that argument is directly contradicted by the record and more specifically by the trial court's order.

Dr. Posluns' deposition then continued on July 28, 1998, and he was even more belligerent and hostile.[2] Dr. Posluns was again asked for his social security number, and he stated, "Well, when the judge, as I said before, when the judge orders me to do so I will give it for a specific purpose." Plaintiffs' counsel ultimately conceded that the trial court had ordered that Dr. Posluns produce his social security number; however, Dr. Posluns continued to refuse to produce the number. When asked again for his Social Security number, Dr. Posluns stated that he did not know it, and that he did not think that he had ever used his social security number. Defense counsels then agreed that they would

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[1] Defendant Bowen had first requested Dr. Posluns' social security number by way of an interrogatory; however, plaintiffs' answers to interrogatories, dated March 20, 1998, refused to divulge this information as being "immaterial and irrelevant" and that this information was for a "non-relevant time period."

[2] We note that throughout his deposition, Dr. Posluns' conduct was quite disturbing as the transcripts reveal that he was hostile and repeatedly used vulgar, profane, and abusive language.

file a motion to dismiss based on Dr. Posluns' repeated refusals to produce his social security number, despite the court order.

The hearing on the motion to dismiss was held on July 29, 1998. The trial court noted on the record that Dr. Posluns had filed an affidavit with his motion for reconsideration and attached a sealed envelope that contained four series of numbers: one series is the identification number that he was given when he first came to the United States and the other three series are alien registration numbers. Dr. Posluns further averred that he never displayed a social security card. The trial court reserved ruling on defendants' motion to dismiss, wishing to review the deposition transcripts.

The trial court ruled from the bench on August 17, 1998, that Dr. Posluns failed to permit discovery, contrary to MCR 2.313, and that his answers were "evasive, frivolous, recalcitrant and disruptive given to proper questions." The trial court also ruled that plaintiffs were to reimburse defendant for attorney fees and costs for the July 28, 1998 deposition and for the filing and hearing of the July 29, 1998 motion. The costs, ordered at a compromise amount of $9,000 (defendants had requested costs in the amount of $18,499.85), were to be paid within twenty-eight days.

The first question to be considered on appeal is whether the trial court abused its discretion in sanctioning plaintiffs. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998); *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). MCR 2.313(A)(5)(a) permits a trial court to require the party whose conduct necessitated the motion to compel discovery to pay the moving party the reasonable expenses incurred in obtaining the order. Plaintiffs initially argue that there was no discovery order, thus, the trial court's order of sanctions was a palpable error of law. In this regard, plaintiffs contend that there was no discovery order compelling Dr. Posluns' deposition; however, pursuant to MCR 2.313(A)(2)(a), a party may file a motion to compel discovery if a deponent fails to answer a question submitted on oral examination. A hearing was held on July 20, 1998, where the trial court stated on the record that it was granting the motion to compel production of Dr. Posluns' social security number, but that the number could not be broadcast and the transcript indicates that plaintiffs' counsel was at this hearing. The trial court's written, signed order is dated July 28, 1998 and, thus, there is clearly a discovery order in the lower court record.

Plaintiffs' next argument is likewise not supported by the record. They insist that Dr. Posluns could not comply with the order because he does not have a social security number. However, Dr. Posluns never stated as such during his deposition testimony. Dr. Posluns first responded that he had a social security number, but that he would not produce it because it was under tight security. He then stated that he could provide it, but that he would not do so without a court order. After defendants obtained the court order, Dr. Posluns' response was that he did not know his social security number. The only time that Dr. Posluns claimed to not have a social security number was in an affidavit sworn on August 12, 1998, after the final day of his deposition. A party cannot attempt to create an issue of material fact in a later-filed, contradictory affidavit. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256; 503 NW2d 728 (1993). Thus, plaintiffs' claim on appeal that Dr. Posluns does not have a social security number is contradicted by his own deposition testimony and not a basis for reversal of the trial court's order.

Plaintiffs' additional contention that the trial court failed to find that Dr. Posluns wilfully failed to comply with the discovery order is likewise without record support. The trial court stated at the August 17, 1998 hearing that Dr. Posluns failed to permit discovery, contrary to MCR 2.313, and that his answers were evasive, frivolous, recalcitrant, and disruptive given to proper questions. Even after obtaining the order compelling production of the social security number, Dr. Posluns again refused to produce it. The record indicates that the trial court clearly reviewed the deposition transcripts and Dr. Posluns' conduct could only be considered as a wilful violation of the trial court's order compelling production of his social security number.

Plaintiffs further argue that time period between the violation of the discovery order and the motion to dismiss was too short; however, there is no time period requirement between violation of a discovery order and a party's decision to move for dismissal based on that violation. Here, Dr. Posluns refused on numerous occasions to produce his social security number, refused to produce it in face of a trial court order compelling production dated July 28, 1998, and we note that the case was not dismissed until October 26, 1998. There is no error in this regard.

Plaintiffs also argue that sanctions were not appropriate because defendants were not otherwise prejudiced by not obtaining Dr. Posluns' social security number. They contend that the medical documentation was more than adequate and that other discovery responses were sufficient and continuing. This, however, does not address the allegation of over $20,000,000 in lost profits that plaintiffs claim for home business ventures that were about to be started but for the pesticide poisoning. Defendants' request for Dr. Posluns' social security number would seem to be a reasonable one in light of the alleged damages so as to verify plaintiffs' claim. Accordingly, we reject as untenable plaintiffs' claim that defendants were not prejudiced by Dr. Posluns' refusal to produce his social security number.

Plaintiffs also argue that the trial court abused its discretion and erred as a matter of law when it considered other conduct of Dr. Posluns at his deposition when imposing sanctions. This Court has held that severe sanctions are generally appropriate only when a party "flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Further, the trial court should state on the record the factors involved and the options considered when determining what sanction is appropriate. *Id.* Here, the trial court noted Dr. Posluns' conduct at his deposition, which included conduct not directly related to producing his social security number. However, because a court should consider whether the party's violation of the discovery order is wilful or accidental when determining an appropriate sanction, the trial court's decision was clearly proper in that it was noting Dr. Posluns' overall conduct to find that the violation was wilful, as opposed to merely accidental. Accordingly, we find no error in the trial court's consideration of Dr. Posluns' conduct not directly related to his refusal to produce his social security number in determining the appropriate sanction.

Plaintiffs also argue that the trial court erred in failing to conduct an evidentiary hearing when it determined the amount of sanctions at $9,000. At the August 17, 1998 hearing, after finding that Dr. Posluns violated the court's order compelling production of his social security number, a discussion was

held off the record. The trial court then stated on the record that it had suggested a compromise amount of $9,000[3] (less than half that requested by defendants). The trial court ordered that this amount was to be paid by September 28, 199. MCR 2.313(B)(2) provides that the court *shall* require the party failing to obey an order to compel to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that an award would be otherwise unjust. Thus, an award of expenses incurred because of the failure to obey is mandatory, unless the failure was substantially justified or an award would be unjust. The court rule is silent with respect to whether a hearing is necessary to determine the sanction amount.

Because an award of expenses is mandatory by the language of the court rule, and because plaintiffs did not object to the lack of an evidentiary hearing below, there is no error on the part of the trial court where no evidentiary hearing was held. Moreover, because an award of reasonable expenses is mandatory and there is no showing by plaintiffs that Dr. Posluns' failure to produce was substantially justified or that an award was otherwise unjust, we cannot conclude that the trial court abused its discretion in ordering a sanction amount of $9,000. To the extent that plaintiffs also argue that the trial court erred in failing to determine their ability to pay the sanction amount, plaintiffs never contended below that they were financially unable to pay, accordingly, this argument has been forfeited.

Plaintiffs also argue that unprofessional and threatening tactics employed by certain defense counsels hindered the discovery process. First, we note that plaintiffs' argument is largely unsubstantiated by the record and, second, plaintiffs' allegations in this regard are not relevant regarding whether Dr. Posluns violated the trial court's discovery order. Accordingly, this unsubstantiated allegation is not a basis for reversing the trial court's decision.

At the August 17, 1998 hearing, the trial court stated on the record that plaintiffs had until September 28, 1998 to pay the sanction. The order, dated September 24, 1998, further states that plaintiffs' failure to pay the sanction would result in dismissal of the suit. At a hearing held on October 5, 1998, defendants moved for dismissal based on plaintiffs' failure to pay the sanction. The trial court allowed for more time for payment, until October 19, 1998, acknowledging that failure to pay would lead to a more drastic sanction of dismissal. At the final hearing held on October 26, 1998, the trial court denied plaintiffs' motion for reconsideration and granted the motion to dismiss because of plaintiffs' failure to pay the sanction. The trial court ordered that plaintiffs' complaint be dismissed in its entirety; plaintiffs contend that this ruling constitutes an abuse of discretion.

MCR 2.313(B)(2)(c) permits a trial court to dismiss an action against a party who fails to obey a discovery order. The trial court's imposition of a discovery sanction is reviewed for an abuse of discretion. *Bass, supra,* p 26. Because dismissal of an action is a drastic step, it should be exercised with caution. *Barlow v John Crane-Houdaille, Inc,* 191 Mich App 244, 251; 477 NW2d 133 (1991); *Hanks v SLB Management, Inc,* 188 Mich App 656, 658; 471 NW2d 621 (1991). Before dismissing an action, a court should carefully evaluate all available options on the record to determine

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[3] The trial court stated that this total amount represented $7,000 for the taking of the July 28, 1998 deposition and $2,000 for the preparation and attendance of the July 29, 1998 motion.

whether dismissal of the claim is appropriate. *Bass, supra,* p 26; *Thorne, supra,* p 633; *Hanks, supra,* p 658. The sanction of dismissal is generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. *Bass, supra,* p 26; *Thorne, supra,* p 633. Further, the record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. *Bass, supra,* p 26. The factors that should be considered are: (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests; (3) the prejudice to the other party; (4) actual notice to the other party of the witness and the length of time before trial that the other party received such actual notice; (5) whether there exists a history of the party's engaging in deliberate delay; (6) the degree of compliance by the party with other provisions of the court's order; (7) an attempt by the party to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. *Id.,* pp 26-27; *Dean v Tucker,* 182 Mich App 27, 32; 451 NW2d 571 (1990).

After review of the record, we find that the trial court exercised its discretion cautiously and dismissed the action only as a last resort. Dr. Posluns refused to disclose his social security number in answers to interrogatories, at his April 2, 1998 deposition, and again at his July 28, 1998 deposition despite the fact that the trial court had ordered Dr. Posluns to produce his social security number. The trial court initially ordered a lesser sanction of costs, and plaintiffs again did not abide by that order. Thus, plaintiffs have violated two of the trial court's orders relating to discovery. Further, Dr. Posluns' conduct was clearly wilful, and can be described as hostile, evasive, and vulgar. Dr. Posluns' claim that he does not have a social security number in his affidavit is directly contradicted by his own deposition testimony that he has a social security number, but that he would not disclose it without a court order. Even with the court order, Dr. Posluns continued to refuse to disclose his social security number.

Moreover, this is not a situation where the trial court immediately imposed a severe sanction of dismissal. Rather, the trial court increased the sanctions with full warning to plaintiffs. The order compelling discovery was entered on July 28, 1998 (after the trial court stated on the record on July 20, 1998 that it was granting defendant's motion to compel), and the order for sanctions was entered on September 24, 1998, with notice in the order that the action would be dismissed if plaintiffs did not pay the sanction by September 28, 1998. In fact, the trial court extended the time to allow plaintiffs to pay the sanction; however, plaintiffs failed to pay the sanction. Additionally, the request for Dr. Posluns' social security number related directly to plaintiffs' claim for economic damages, and the failure to produce related to an important issue in the case, as opposed to a mere tangential issue. Accordingly, we find that the trial court did not abuse its discretion in entering the order of dismissal.

Lastly, plaintiffs argue that even if the order for sanctions and order of dismissal were properly entered, the trial court should not have dismissed Mrs. Posluns' case because of Dr. Posluns' conduct. At the August 17, 1998 hearing, the trial court stated that there were costs that were needlessly caused by a witness in Mrs. Posluns' case, who was also a plaintiff, and that she too was responsible for the costs of the case. The trial court warned that it would dismiss the case against both plaintiffs if the sanction was not paid.

Both plaintiffs in this case were witnesses in each other's behalf. As noted by defendants, the economic damages claim involves plaintiffs' assertion that they lost millions of dollars in lost profits from home businesses that were about to be started but for the pesticide contamination. However, when it came to verifying the damages claims, both plaintiffs were rather evasive. For example, Dr. Posluns testified that his wife prepared all the tax returns and that he did not recall what his sources of income were for the years 1992 to 1995; Mrs. Posluns testified at her deposition that her husband prepared and filed a 1997 tax return for their business (University at Sea) and that she had no idea where the tax return was kept.

The trial court's reasoning in this case is supported by MCR 2.313(B)(2) which provides that if a person designated under the court rules pertaining to taking depositions and testifying on behalf of a party fails to obey an order to provide or permit discovery, the court may order sanctions as are just. Thus, this court rule authorized the trial court to include Mrs. Posluns in the order for sanctions where her co-plaintiff, Dr. Posluns, refused to abide by the court's order compelling him to produce his social security number. Further, although the initial violation of the discovery order was exclusively as a result of Dr. Posluns' conduct in failing to produce his social security number, the order for sanctions was directed toward both plaintiffs, thus, it is not accurate for plaintiffs to argue that Mrs. Posluns did not violate any discovery order. In fact, she too failed to pay the order for sanctions. Therefore, the trial court did not err as a matter of law or abuse its discretion in assessing costs against Mrs. Posluns and ultimately dismissing her case as well.

Accordingly, we conclude that the trial court did not abuse its discretion with respect to any of the discovery orders it entered, including the final order of dismissal.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Michael J. Talbot